Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MICHAEL TENNER,

Petitioner,

v.

PETER WALKER, Sheriff,
CHRISTOPHER B. EPPS, Acting Commissioner,
and MICHAEL C. MOORE, Attorney General,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The case is about the Sixth Amendment's confrontation right. Before Tenner's trial, the State's informant called Tenner's lawyer to say that he would not testify against Tenner. The informant changed his mind. To establish the informant's motive to testify against him, Tenner sought to question the witness about the witness' past criminal acts. Counsel believed the witness' drug-laden history was being used by the prosecution as leverage. The examination was barred and that judgment has been affirmed.

Tenner's habeas petition on the exhausted Sixth Amendment issue was denied. In refusing a certificate of appealability, the Fifth Circuit stated the following standard: "[Tenner must show] 'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' (Citation omitted) *Additionally*, because the state courts considered Tenner's Confrontation Clause claim on the merits, this claim must be considered through the deferential lens of 28 U.S.C. § 2254(d). (Citation omitted) *Accordingly*, Tenner may not receive a COA on his Confrontation Clause claim unless he can make a substantial showing that the state court's rejection of his claim constituted an unreasonable application of, or was contrary to, United States Supreme Court precedent." (emphasis supplied)

I. Was the standard employed by the Fifth Circuit contrary to this Court's rule which requires the petitioner to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong?

QUESTIONS PRESENTED – Continued

II. Was the district court's rejection of Tenner's showing that his confrontation right was curtailed a debatable or incorrect assessment of the Confrontation Clause claim and therefore a sufficient showing for the Court to reverse and remand with an order to issue the certificate of appealability?

PARTIES

All parties appear in the caption. Petitioner will be referred to as "Tenner," and the Respondents will collectively be referred to as the "State."

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CITATION TO OPINION

The Fifth Circuit's order, handed down on October 31, 2002, and the single judge's previous ruling, issued on September 13, 2002, have not been published. These orders are reproduced in the Appendix. The district court's unpublished opinion is also reproduced in the Appendix pursuant to Rule 14(1)(*i*)(ii).

JURISDICTION

Under *Hohn v. United States*, 524 U.S. 236, 253 (1998), the Court has jurisdiction under 28 U.S.C. § 1254(1) to review denials of applications for certificates of appealability by a court of appeals' panel. Under Rule 13(1), the Petition is timely filed on or before January 29, 2003.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

Issuing a certificate of appealability is governed by 28 U.S.C. § 2253, which states in relevant part:

> (a) In a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State Court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The Sixth Amendment to the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment's Confrontation Clause was applied to the States through the Fourteenth Amendment's due process provision by the Court's decision in *Pointer v. Texas*, 380 U.S. 400 (1965).

STATEMENT OF THE CASE

As for the district court's jurisdiction, on direct appeal the Court of Appeals of Mississippi handed down its unpublished opinion affirming the trial court's conviction and sentence on September 29, 1998. The Supreme Court of Mississippi denied Tenner's petition for certiorari on May 13, 1999. On October 4, 1999, the Supreme Court of the United States denied Tenner's petition for certiorari (No. 99-257), and the Mississippi appellate court issued its mandate on November 16, 1999.

As the direct appeal had raised the Sixth Amendment issue, it was exhausted and Tenner timely filed his habeas petition with the United States District Court for the

Southern District of Mississippi on March 28, 2000. Exactly two years later, the District Court denied Tenner's motion for summary judgment and dismissed the action. Tenner timely filed his notice of appeal on April 25, 2002.

The factual odyssey began late in the evening of November 17, 1995, when James "Judge" Ellis met with law enforcement officers to execute a drug purchase. (T. 96-97) Ellis was sixty-nine or seventy years old at the time. (T. 146) Asked how he came to be working for law enforcement, Ellis said, "They had asked me, you know, would I help them or something like that." (T. 94) Mississippi Bureau of Narcotics Agent Kenny Cotton testified that Ellis had become a confidential informant "for the community. He – he volunteered – well, he and I had talked about it a couple of times, you know, because I couldn't offer him anything. The judge had already sentenced him." (T. 118)

Ellis, asked whether he had already been convicted when law enforcement officials asked him to be an informant, said, "Well, they had, you know, been – no – yes, I was. I had been convicted." (T. 94) As he later explained at the hearing on a post-trial motion, "they had been working that deal a long time ago, way before [the conviction], night and day." (T. 252)

On cross-examination during the trial, Ellis was asked how many times he had sold cocaine in Jefferson County. The District Attorney's relevance objection, contending that Ellis' conviction was already before the jury, was sustained. (T. 80) At a sidebar following that ruling, Tenner's lawyer explained:

> MR. McGEHEE: I would like to find out what this relationship is [between Ellis and the

> State]. Also, I think it's very relevant how many time [sic] he sold cocaine in Jefferson County versus how many times he was indicted and the charges he pled guilty to.
>
> THE COURT: I've already sustained that objection.

(T. 81) Tenner wished to inquire into Ellis' history and whether the State was graciously declining other prosecutions to reinforce Ellis' volunteer spirit.

The agent, Cotton, had given Ellis three marked one hundred dollar bills. (T. 97) Ellis drove to a country store owned by Tenner's mother and, according to Ellis, he arrived there about 10:00 p.m. (T. 100, 190) Ellis stopped twenty-five feet from the store to be met by a man Ellis identified as Tenner and from whom Ellis purchased drugs. (T. 83-84)

Within minutes of Ellis' departing, Cotton and other officers arrived. Cotton asked a man outside the store, Michael's brother, Roosevelt, if Michael were there. (T. 103, 168) Michael, a friend, David Buckles, and Michael's other brothers, Charles, Cornelius, and Will, all emerged from the store. At trial, Ellis had testified he saw no one else outside except Michael. (T. 84)

Tenner was searched but no drugs were found. (T. 134) Cotton did find in Tenner's possession over six hundred dollars in U.S. currency, including the State's three marked bills. (T. 105-06, 135) David Buckles testified that Michael did not leave the store between about 8:45 p.m. and when the Sheriff and other law enforcement officers arrived at about 10:00 p.m. (T. 203) Roosevelt Tenner admitted that he, not Michael, had received the money from Ellis, explaining that he had gone inside to get

"change" for the large denominations from payroll funds held by Michael for the brothers' trucking operation. Roosevelt denied selling Ellis cocaine. (T. 167, 171)

Ten days before trial, Ellis called one of Tenner's lawyers, Bobby Lamar Cox, at Cox's home. Ellis told Cox he would not testify against Tenner. At trial Ellis denied calling Cox. (T. 93) Cox then testified that Ellis had lied. (T. 213-14) Receiving the case at 6:30 p.m. on July 3, 1996, the jury quickly returned a guilty verdict. (T. 240; C.P. 105)

At the evidentiary hearing on Tenner's motion for a new trial, Ellis admitted he had called Cox. (T. 250) Ellis recanted his identification of Michael Tenner as the seller:

> A. No, I don't [know who sold the cocaine]. Because see, it was so quick and what it was – I had – they gave me two shots in this eye, and one – and when nighttime come, a car light be giving off a spark. And I really just can't see too good at night.

(T. 251) Ellis said that he testified against Tenner even though he could not be sure from whom he bought cocaine because he was afraid of the "narks." (T. 261)

On direct appeal, the Mississippi Court of Appeals found that, "[a]ny alleged curtailment by the trial court affecting or limiting Tenner's inquiry into Ellis' relationship with law enforcement is unsupported by the record." (Court of Appeals' Opinion at 7) The Court of Appeals was factually incorrect. The Mississippi court's opinion stated that Tenner's question relating to Ellis' past sales of cocaine had been allowed. (Court of Appeals' Opinion at 6-7)

The Court of Appeals of Mississippi then said, "It is well settled that the relevancy and admissibility of evidence are within the trial court's discretion and reversal may be had only where that discretion has been abused." (Court of Appeals' Opinion at 7) The Mississippi Court's decision never mentioned the Confrontation Clause or its standard compelling cross-examination into a witness' bias, motive, or interest. The Mississippi Court dismissed Tenner's constitutional claim by saying, "we are not persuaded that additional inquiry by Tenner would have produced substantial interest, motive, or bias not already established." (Court of Appeals' Opinion at 7)

Following Tenner's habeas petition, the district court said much the same thing. In order to do so, the district court misstated Tenner's argument, saying Tenner had argued "that the [Mississippi] Court of Appeals misstated constitutional law when it stated that 'the relevancy and admissibility of evidence are within the trial court's discretion. . . . '" Tenner has never contended that the Sixth Amendment compels unlimited cross-examination.

The problem with the district court's view is that Tenner's attempted examination was not irrelevant, nor was it harassing, repetitive, or argumentative. The discretionary rule relating to confrontation does not apply to this case.

However, the Mississippi trial court sustained a relevancy objection when Tenner's counsel tried to inquire into past criminal conduct. The Mississippi courts and the district court got the cart before the horse in considering "relevance" before determining whether the *scope* of examination required by the Confrontation Clause had been exercised. While the district court, echoing the

Mississippi court, claimed that Tenner was able to "extensively" examine "the confidential informant Ellis regarding prior drug buys and sales," the portion of the transcript reproduced *supra* belies these claims.

On appeal to the Fifth Circuit, that Court, by local rule, first referred the application to a single judge. Local Rule 27.2.3. That judge's order is reviewable by a panel upon application therefor. Local Rule 27.2. The single judge order in this case first recited the *Slack*[1] standard requiring a petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Then the judge added the following gloss: "Additionally, because the state courts considered Tenner's Confrontation Clause claim on the merits, this action must be considered through the deferential lens of 28 U.S.C. § 2254(d). (Citation omitted) Accordingly, Tenner may not receive a COA on his Confrontation Clause claim unless he can make a substantial showing that the state court's rejection of this claim constituted an unreasonable application of, or was contrary to, United States Supreme Court precedent. (Citation omitted)"

On panel review, this order was adopted without comment. The problem, of course, is that it is one thing to ask whether a district court's assessment of a state court's judgment relating to constitutional law is debatable or wrong, and quite another to demand that applicants seeking only a certificate of appealability show that the

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[1] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

state court judgment was an unreasonable application of, or contrary to, this Court's holdings. One would have thought this latter point the subject of the appeal.

The Fifth Circuit's holding in this case requires that Tenner win his appeal before it is heard. This cannot be what Congress intended with the recent AEDPA amendments, or what the Court in *Slack* intended when it updated the former "probable cause" standard announced in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's standard for issuing a certificate of appealability improperly requires the convicted appellant to demonstrate that the district court must be reversed.

A. What this case is not about.

This case has excited odd and alarming reactions from courts. The Mississippi court resorted to judicial dissembling to hold that Tenner's right to confront the witness had not been curtailed. The face of the record impugns that conclusion.

On habeas petition, the district court failed to cite any of the Court's Sixth Amendment holdings. All know that the AEDPA requires a comparison of the relevant rule, as announced *only* by this Court, with the result of the state court. 28 U.S.C. § 2254(d)(1). The district court's dutiful quotation of the statute was empty form.

In its discussion relating to the Sixth Amendment, the district court mentioned only one case from this Court, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). But the

district court cited *Van Arsdall* not for its Sixth Amendment holding, but for the irrelevant proposition that the Sixth Amendment does not compel unlimited cross-examination. No court has condescended to explain what the trial court was exercising its discretion about or in what manner the attempted questioning was "irrelevant."

This case is not about whether a state's judicial department has the authority to control the process before it. Whatever the decision of this Court, it will not in any way affect the Mississippi executive department's ability to prosecute alleged drug dealers through compensated informants.

This case is not about whether Michael Tenner is guilty. Tenner's appearance here is only about whether the process through which he was tried was fundamentally fair to him, as measured by the Sixth Amendment.

If the Sixth Amendment issue is refused by the federal courts, then the State will arbitrarily curb cross-examination. As Justice Scalia noted in dissenting from the Court's refusal of the writ in *Danner v. Kentucky*, 119 S.Ct. 529 (1998), "the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense."

If the certificate of appealability standard used by the Fifth Circuit is not reviewed, and either rejected or at least elucidated, then its seemingly insuperable barrier will radically undermine the Sixth Amendment's "great engine" in the search for truth.

B. To issue a certificate of appealability, all that should be considered is whether a district court's assessment of the claim is debatable or wrong and that a petitioner has made a showing sufficient "to deserve encouragement to proceed further."

Pursuant to Rule 10(c), Tenner would show that the standard announced by the Fifth Circuit "conflicts with relevant decisions of this Court." There are two leading cases dealing with the procedural mechanism now known as a "certificate of appealability": *Slack v. McDaniel*, *supra*, and *Barefoot v. Estelle*, *supra*.

Slack was convicted of murder by a Nevada court in 1990. After an unsuccessful direct appeal, he sought habeas review in federal court on unexhausted grounds. That petition was dismissed "without prejudice." After unsuccessful state post-conviction proceedings, Slack returned to federal court in 1995. Unfortunately, Slack again raised unexhausted claims and, under circuit law, the State moved to dismiss the petition as an abuse of the writ. The district court dismissed and then denied what was known as a certificate of probable cause ("CPC") under pre-AEDPA Section 2253. The Ninth Circuit also refused to issue the certificate of probable cause. *Slack*, 529 U.S. at 478-80.

Because Slack's petition was pre-AEDPA, but the appeal was not, the Court first had to decide what version of Section 2253 applied. Because appeals are distinct temporal steps in litigation, the Court decided that since the appeal was filed after the AEDPA amendments, the current version would apply. *Id.* at 481-82. The Court then observed that the post-AEDPA § 2253 substantially codified the standard announced in *Barefoot*: "Except for

substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. at 894." *Id.* at 483.

To obtain the certificate of appealability, "a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Id.* at 484, *quoting Barefoot*, 463 U.S. at 893, fn. 4.

As the Court went on to say, "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

The *Slack-Barefoot* standard requires:

- a "substantial" showing that a constitutional right was denied;
- that reasonable jurists could disagree with the district court's result – or agree that the result was wrong;
- or that the issues presented are "adequate" to deserve further appellate consideration.

In this case, the Fifth Circuit quoted the *Slack-Barefoot* standard and then inexplicably added a gloss, stating that a petitioner "may not receive a COA . . . unless he can make a substantial showing that the state court's

rejection of [a constitutional] claim constituted an unreasonable application of, or was contrary to, United States Supreme Court precedent."

Not only must a petitioner show that a district court's result was debatable, in light of whether a constitutional claim is made out, but the petitioner must demonstrate to the Fifth Circuit that the state court's ruling was unconstitutional. One would have thought this was the function of the appeal itself.

It is one thing to ask, as *Slack* requires, whether a district court's assessment of whether a state court's judgment is contrary to established law is debatable or wrong. It is a very different thing to demand that applicants seeking only a certificate of appealability show that the state court judgment was an unreasonable application of, or contrary to, this Court's holdings.

In effect, the Fifth Circuit's standard requires habeas petitioners to win their appeals before they are heard. The *Slack-Barefoot* standard requires that if the district court's assessment of "holding v. state court result" is objectively debatable or wrong, then the certificate should issue.

The Fifth Circuit has added another layer requiring an independent "substantial showing that the state court's rejection of this claim constituted an unreasonable application of, or was contrary to, United States Supreme Court precedent." The Fifth Circuit was not explaining what the district court's job is, it was stating the standard the courts must use for issuing certificates of appealability. Had the Fifth Circuit been merely explaining how the *Slack-Barefoot* standard is applied, it would not have used the words "[a]dditionally" and "accordingly" to express the showing "Tenner has not made. . . . "

Even if the Fifth Circuit's standard does not compel a showing that the district court must be reversed in order for the certificate of appealability to issue, it invites that interpretation which discourages review in all cases, not merely the insubstantial appeals § 2253 is designed to weed out. This cannot be what Congress intended with the recent AEDPA amendments, or what the Court in *Slack* intended. The Court should grant the writ or summarily reject the Fifth Circuit's gloss on the *Slack* standard and reverse.

II. Tenner is entitled to a certificate of appealability because he has shown the denial of a Sixth Amendment right and that the district court's assessment of his claim is wrong or at least debatable.

As a federal habeas matter, the starting point is the statute. Whether the district court's result is debatable or wrong will turn, in part, on what the petitioner must prove. For grounds to which Section 2254(d) applies, Tenner must show that the state court's decision was contrary to *or* involved an unreasonable application of clearly established constitutional law as announced by the Court. 28 U.S.C. § 2254(d)(1), as amended.

In *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000), the Court provided some guidance in determining: (i) when law is clearly established, and (ii) when a state's decision is "contrary to" such law. Paralleling the "clearly established" standard for Section 1983 actions, the Court concluded that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," meant the Court's holdings, as opposed to dicta, at the time of the state court's decision. *Id.* at 412.

According to the *(Terry) Williams* Court, the "contrary to" phrase means that a state court's decision must be substantially different from relevant Supreme Court precedent. A state court's decision will, therefore, be "contrary to" the Supreme Court's clear precedents if the state court "applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405.

A. The law is clearly established that the bias, interest, or partiality of a witness is subject to the most searching cross-examination. The Mississippi Court's decision, which did not even mention the Sixth Amendment, is contrary to the Sixth Amendment standard for cross-examination announced by the Court.

Tenner's confrontation right is guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. *Pointer*, *supra*; *Smith v. Illinois*, 390 U.S. 129 (1968) (applying Sixth Amendment to states). Because the main function of the Confrontation Clause is the examination of witnesses appearing personally before the accused, generally cases separate into a "scope of cross-examination" branch and an "out-of-court statement" or hearsay branch. *Coy v. Iowa*, 487 U.S. 1012 (1988). This petition relates to the "scope" cases.

The Sixth Amendment is crucial to criminal defendants because the advocate's armamentarium contains few effective means of countering either a prosecutor's misuse of an informant or an informant's manipulation of the prosecutor, or anything between. The Sixth Amendment is

the "great engine" for checking manipulative or manipulated witnesses. *Accord, Chambers v. Mississippi*, 410 U.S. 284 (1973).

The Supreme Court's seminal case in this area is *Alford v. United States*, 282 U.S. 687 (1931). The Court considered whether the trial court's ruling that Alford could not inquire into the informant's custodial status with law enforcement infringed Alford's Sixth Amendment right to confrontation. As in this case, the trial court thought that Alford only could impeach the witness by showing a conviction. *Id.* at 689.

The Court of Appeals dismissed Alford's attempted cross-examination as a "fishing expedition." An incredulous Supreme Court said that "[t]o say . . . prejudice can be established *only* by showing that the cross-examination, if pursued, would *necessarily* have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Id.* at 692 (emphasis supplied).

As for the witness' custody, the Court said that the point of the cross-examination was to show that the witness' testimony "was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States which was conducting the present prosecution." *Id.* at 693. Alford was entitled to show the imbalance in the witness' bargaining position to suggest the witness' testimony "was affected by fear or favor growing out of his detention." *Id.*

Summing up, the Court held that *scope* of cross-examination as a Sixth Amendment matter cannot be limited to preclude examining the witness about bias or motivation to testify: "[There is no] obligation [ ] imposed

on the court . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." *Id.* at 694.

In this case, Tenner was precluded by the trial court from engaging in the most prototypical kind of bias or motive inquiry: events in the witness' past the State might be holding over the witness' head. There is no material difference between Alford's attempted inquiry about the informant's custodial status and Tenner's aborted effort to find out what uncharged criminal acts the State might have been holding as insurance. How such testimony would not be "relevant" passes understanding. Nor, obviously, did Tenner seek details of the witness' past criminal acts which might have run afoul of the Fifth Amendment.

Here, both the Mississippi court and the district court concluded that Tenner had adequately shown Ellis' potential motive to lie or his bias. Each court was unpersuaded that additional inquiry would have netted Tenner any additional compelling evidence. That conclusion flies in the face of this holding: "[t]o say . . . prejudice can be established *only* by showing that the cross-examination, if pursued, would *necessarily* have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

Comparing the *Alford* holding about the permissible scope of cross-examination on bias or motive with the Mississippi court's result shows that the Mississippi

appellate court's decision was contrary to Sixth Amendment law. The district court's assessment was wrong, or at least debatable.

Alford's central principles were reinvigorated in *Davis v. Alaska*, 415 U.S. 308 (1974). In that case, Davis was identified by sixteen-year-old Richard Green as one of two men with whom Green had chatted near where a safe, burgled from the Polar Bar, was later discovered. Green's evidence was crucial to placing Davis at the scene and identifying him as the man with a crowbar. *Id.* at 310.

Green, it turned out, had been convicted, as a juvenile, for two burglaries. The defense wished to show that Green was on probation and that his testimony might have been the result of the boy's understandable misgivings regarding the continuing vitality of his probation. Because Alaska law forbade revealing Green's juvenile record, the trial court refused to permit cross-examination about the boy's burglaries or probationary status.

The Supreme Court of Alaska upheld the conviction because Davis had been able to "adequately" cross-examine Green. The Court disagreed, again noting that the scope of cross-examination, under the Sixth Amendment standard, is typically measured by either of two approaches: "One way of discrediting the witness is to introduce evidence of a prior criminal conviction. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness. . . ." *Id.* at 316.

Restating *Alford*'s holding, the Court said that courts may not speculate as to whether the jury, the sole judge of credibility, would have placed much weight on the facts

which might have been revealed by the cross-examination, but that Davis was entitled, under the Sixth Amendment, to place such facts before the jury. The Court also emphasized that this result is most compelling in cases where the witness is key to the prosecution. *Id.* at 317.

In this case, both the Mississippi appellate court and the district court were dismissive of Tenner's attempt to inquire about the witness's other criminal acts to show bias or motive. The Mississippi court said that the jury was "amply aware of any potential bias, motive, or interest Ellis may have harbored." (Court of Appeals' opinion at 7) The district court said, "As the cross-examination of Ellis . . . shows, the jury was given adequate information to appraise the bias and motives of the witness." As the Court's *Davis* opinion says, it is not for a reviewing court to magisterially declare the jury was "adequately" informed.

The defendant has a constitutional right to present evidence of bias and motive, regardless of the reviewing court's opinion of the admitted evidence's adequacy. The point, of course, is that the reviewing court has no basis for opining that the jury was "adequately" informed of a witness' bias or motive *without the omitted testimony*. The district court's assessment of Tenner's claim was incorrect, or at least debatable.

Two other more recent cases are relevant: *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); and *Olden v. Kentucky*, 488 U.S. 227 (1988). In *Van Arsdall*, Fleetwood got his drunk driving charge dropped in return for providing information about a murder. Naturally, Van Arsdall was prevented from inquiring into these circumstances, and the Court reversed, saying "a criminal defendant states a

violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* at 680.

There is no obvious distinction between inquiring about dropped charges and about uncharged prior acts, as Tenner attempted. It may be that evidence of uncharged acts is more important because, as here, the prosecutor can give the appearance of a penitent "volunteer" having already been convicted, countering the conviction's general impeachment, while possibly retaining other potential charges as leverage. The Mississippi court's holding that Tenner was able to sufficiently cross-examine the informant flies in the face of the Court's holding that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."

As in *Van Arsdall*, Tenner was precluded from *all* questioning about Ellis' bias or motive, other than the admitted conviction. The district court said that "Tenner's attorney extensively questioned . . . Ellis regarding prior drug buys and sales, that he had been convicted and was currently serving time . . . and the details of the alleged drug sale." The district court was factually incorrect. The trial court twice sustained objections to that line of questioning. As in *Davis*, Tenner was able to ask whether Ellis lied, but he was not able to show the jury any facts, other than his lawyer's having received a call from Ellis, which suggested that Ellis had a motive to lie. The district court's assessment of the claim was wrong, or at least debatable.

The *Olden* case was a *per curiam* summary reversal, a result fervently wished for here. Olden and Harris, both of African descent, were indicted for raping Starla Matthews who was white. Matthews said she went to a juke joint with a friend, where she became intoxicated. Unable to locate the friend, Olden and Harris offered to drive her to this friend. Thereafter, according to Matthews' several stories, she either was raped by two men, four men, or only by Olden.

After the act or acts, at Matthews' request Olden and Harris dropped her off at one Bill Russell's house. Russell and Matthews, though at the time married to others, were cohabiting. Russell was of African descent. *Id.* at 228-31.

The defense wished to bring out the facts of the affair and cohabitation as motive evidence showing that Matthews had a personal reason to testify that the acts were non-consensual. The trial court refused; the Kentucky Court of Appeals explained the evidence was properly excluded under Kentucky's version of Rule 403, Fed.R.Evid., because the matter of race could "'create[] extreme prejudice against Matthews.'" *Id.* at 231.

The Court held that the Kentucky court had failed to accord proper weight to Olden's confrontation right. "[W]ithout acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation, the court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' inter-racial relationship would prejudice the jury against her. While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as 'harassment, prejudice,

confusion of the issues, the witness's safety or interrogation that [would be] repetitive or only marginally relevant' (citation omitted), the limitation here was beyond reason." *Id.* at 232.

The Mississippi court in this case also failed to mention the Sixth Amendment. If evidence of an inter-racial extra-marital relationship was appropriate fodder for cross-examination into bias, it is very hard to see how facts relating to uncharged crimes are not also proper grist for the jury's discerning of bias or motive. The State court's holding in this case was contrary to the *Olden* Court's demand that relevant bias or motive evidence be admitted, and only limited by the usual discretionary factors.

Without danger to Ellis' Fifth Amendment rights – or to the proceedings – Tenner expected to show Ellis' criminal history. Tenner hoped to question Ellis on whether the State knew about any of these incidents, whether the State's representatives had discussed any of these incidents with him, and if so, what the discussion was about. Tenner need not have touched on the facts, dates, persons, or circumstances involved in these criminal incidents in order to explore the existence of them and whether they infected Ellis' relationship with the state.

The Mississippi court's and the district court's opinions express a complete failure to consider the nature and effect of such cross-examination. The disregard of the Sixth Amendment on the part of the Court of Appeals of Mississippi is contrary to clearly established law. The district court's similar failure renders its "assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

If the Court fails to grant the writ, or summarily reverse, Tenner will forever lose a fundamental constitutional right to fair process. Tenner cannot imagine that the Fifth Circuit was out to get him. The incorrect standard will not only be applied to him.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60333

MICHAEL TENNER

Petitioner-Appellant

v.

PETER WALKER, Sheriff of Jefferson County; CHRISTOPHER B. EPPS, ACTING COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

(Filed Oct. 31, 2002)

Before BARKSDALE, DeMOSS, and BENVAVIDES [sic], Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's petition for rehearing, treated as a motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60333
USDC No. 5:00-CV-78-BrS

MICHAEL TENNER

Petitioner-Appellant,

versus

PETER WALKER, Sheriff of Jefferson County; ROBERT L. JOHNSON, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Sep. 13, 2002)

ORDER:

Michael Tenner, who was convicted of one count of selling cocaine and sentenced to 30 years in prison, moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition. Tenner contends that the state courts unreasonably applied federal law in determining that his Confrontation Clause rights were not violated when the trial court curtailed his cross-examination of a state witness.

Tenner may not receive a COA unless he makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Such a showing requires that he "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Additionally, because the state courts considered Tanner's Confrontation Clause claim on the merits, this claim must be considered through the deferential lens of 28 U.S.C. § 2254(d). *See Kutzner v. Johnson,* 242 F.3d 605, 608 (5th Cir. 2001). Accordingly, Tenner may not receive a COA on his Confrontation Clause claim unless he can make a substantial showing that the state court's rejection of this claim constituted an unreasonable application of, or was contrary to, United States Supreme Court precedent. *See Williams v. Puckett,* 283 F.3d 272, 277 (5th Cir. 2002).

Tenner has not made this showing. *See Delaware v. Fensterer,* 474 U.S. 15, 18-20 (1985). Accordingly, his motion for a COA is DENIED.

/s/ Harold R. DeMoss, Jr.
HAROLD R. DeMOSS, JR.
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MICHAEL TENNER, #67268 — PETITIONER

VS. — CIVIL ACTION NO. 5:00cv78BrS

PETER WALKER, ET AL. — RESPONDENTS

MEMORANDUM OPINION AND ORDER

(Filed Mar. 28, 2002)

Before the Court is Tenner's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and his Motion for Summary Judgment (**docket entry number 7-1**). Petitioner is represented by counsel. Having considered the petition, the Respondents' answer, the Petitioner's Motion for Summary Judgment and brief in support of the motion, the Respondents' Response in Opposition to the Motion for Summary Judgment, and the State Court Record, the Courts finds that the Motion for Summary Judgment (**7-1**) should be **denied**, and that the petition should be dismissed with prejudice.

I. FACTS AND PROCEDURAL HISTORY

The petition states that Tenner was indicted on December 21, 1995, for allegedly having sold cocaine on the evening of November 17, 1995, to a confidential informant, one James "Judge" Ellis, in Jefferson County, Mississippi. Petitioner was tried on July 3, 1996, before a jury in the Circuit Court of Jefferson County, Mississippi. During trial, Tenner testified in his own behalf and denied

selling cocaine to Ellis, and in his petition, he again denies the charge. In affirming Tenner's conviction, the Mississippi Court of Appeals recounted the facts of the case, as follows:

> During the evening hours of November 17, 1995, members of the Jefferson County Sheriff's Office and the Mississippi Bureau of Narcotics conducted an undercover "buy" of a controlled substance form Michael Tenner. James Ellis, a confidential informant, met with Sergeant James Cotton of the Mississippi Bureau of Narcotics at a staging area in the Tennerville community in Jefferson County just prior to the "buy." Ellis's car and person were searched, and he was fitted with a recording device commonly called a "wire." The serial numbers and photocopies of three $100 bills used to facilitate the "buy" were recorded by Agent Cotton and given to Ellis. Ellis was instructed to locate Michael Tenner and purchase a "quarter" of cocaine or $300 worth. Previous information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier.[1]
>
> After unsuccessfully attempting to contact Tenner at his residence by car phone, Ellis spotted Tenner at the Tennerville Store and relayed the information over the "wire" to Agent Cotton. Ellis then proceeded to purchase a quarter of cocaine from Michael Tenner. Upon completion of

[1] In Petitioner's third ground for relief, he specifically attacks the method by which the Court of Appeals determined the facts recounted in this sentence, asserting that the Court of Appeals violated his due process rights.

the illegal purchase, Ellis met Agent Cotton a short distance from the Tennerville Store. Ellis turned the cocaine over to Agent Cotton and positively identified Michael Tenner as the seller. Agent Cotton and Sheriff Walker then returned to the Tennerville Store and arrested Michael Tenner. A search of Tenner's person revealed the three $100 dollars bills previously recorded by Agent Cotton.

At trial, Ellis was called to testify against Michael Tenner regarding the November 17, 1995 illegal sale of cocaine. Ellis testified to the events of that evening in detail and positively identified Michael Tenner as the person who sold him cocaine. Tenner was convicted of the unlawful sale of cocaine.

Tenner filed a motion for a new trial and a hearing was held on August 15, 1995. At the hearing, Ellis testified that he had incorrectly identified Michael Tenner as the person who had sold him cocaine. Ellis explained in support of his recantation that his eyesight was bad and that his memory was inadequate to recall the details of the sale on November 17, 1995. When asked why Ellis had testified against Tenner at trial, Ellis simply stated he was scared, but could not give any details or elaborate further. The truthfulness and veracity of Ellis's recanting testimony was called into doubt by the court and Tenner's motion for new trial was denied.

Tenner v. State, Miss. Ct. App. 1998, Case No. 97-KA-01082-COA [sic]. These facts do not specifically mention that at trial, Agent Cotton testified in support of the State's case, presenting testimony that he heard the transaction over the body "wire." Furthermore, counsel for Tenner, attorney

Bobby Cox, testified that Ellis had called him prior to trial and had stated that he would not testify at trial against Tenner. In Tenner's defense, two members of his family and a friend present that night gave testimony that although Tenner was in the family's store on the night in question, he did not leave the store at any time. The jury convicted Tenner of the charge, and the court sentenced Tenner, without a prior criminal record, to the maximum penalty of thirty (30) years in the custody of the State.

Tenner appealed his conviction to the Mississippi Supreme Court, which assigned it to the Mississippi Court of Appeals for decision. In his appeal, he assigned three errors, summarized by the Court of Appeals, as follows:

> 1. Whether, in cases of recanted testimony by the State's key witness, Mississippi should withdraw from the confusion occasioned by assessing recanted testimony under the standard for granting new trials on the basis of newly-discovered evidence, and embrace a standard, followed by a majority of the federal courts, where a new trial should be granted if a prima facie showing of false testimony is made and the changed testimony is so material that it might yield a different result if tried anew.
>
> 2. Whether the trial court committed error of a constitutional dimension in failing to allow an exploration into the State's key witness's past actions which could have indicated either bias or the witness's interest in delivering testimony favoring the prosecution.
>
> 3. Whether the trial court erred in permitting a State's witness to opine repeatedly, without any predicate, that the witness heard, via a "body

> wire" on the State's key witness, a conversation with a person "who we thought was Michael Tenner."

Tenner v. State, (Miss. Ct. App. 1998) Appeal No. 96 KA-00930 COA.

Tenner's conviction was affirmed by the Mississippi Court of Appeals on September 29, 1998. The Court of Appeals denied Tenner's motion for rehearing on February 9, 1999.

Tenner then petitioned to the Supreme Court of Mississippi for a writ of certiorari, alleging the following errors:

> 1. Is the Sixth Amendment's Confrontation Clause, applied to states through the Fourteenth Amendment, violated where the defendant is prevented from inquiring about the existence of prior uncharged, unlawful acts committed by the State's witness in an effort to show that witness's motive and bias?
>
> 2. Was Tenner entitled to a new trial, under any standard announced by this Court, based on the recantation of the State's key witness and the absence of evidence showing the recantation was corrupt or corruptly procured?

Appellant's Petition for Writ of Certiorari to the Court of Appeals of the State of Mississippi at 1, State Court Record, Brief and Other Pleadings. The Supreme Court of Mississippi declined to hear Tenner's request for discretionary review by denying his petition for a writ of certiorari on May 13, 1999.

Tenner petitioned the Supreme Court of the United States to grant a writ of certiorari. On October 4, 1999,

that Court denied Tenner's petition. The mandate subsequently issued from the Court of Appeals of Mississippi on November 16, 1999, and Tenner thereafter went into state custody. Tenner did not pursue state post-conviction relief.

Tenner filed his petition for habeas corpus relief in this Court on March 28, 2000, and the State subsequently filed an answer and a complete record. Thereafter, he filed this motion for summary judgment, to which the state responded. Tenner chose not to file a rebuttal. In this action, Petitioner alleges the following grounds for relief, as stated in his Motion for Summary Judgment:

> 1. The Supreme Court of the United States has consistently held that the Sixth Amendment commands that a criminal defendant's scope of confrontation includes the right to inquire into a witness' past actions as they may relate to the witness' relationship with the prosecution and the witness' potential for bias or motive.
>
> 2. The Court of Appeals of Mississippi violated Tenner's right to due process in finding that the jury was fully aware of Ellis' potential for bias or motive to testify in a manner favoring the prosecution.
>
> 3. In affirming the circuit court's judgment of conviction, the Court of Appeals relied on a hearsay statement presented by the State's drug enforcement officer. The Confrontation Clause, generally, does not permit out-of-court statements to be used to convict. An affirmance founded on a basis which could not be used for conviction cannot be sustained.
>
> 4. As a matter of Mississippi law, Tenner was entitled to a new trial because of the State's only

> witness' unimpeached admission that the witness had committed perjury during the trial by identifying Tenner as the person who sold the drugs. Considering the crucial nature of the witness' testimony, the failure of the Mississippi courts to correctly apply Mississippi law violates Tenner's Fourteenth Amendment right that all criminal convictions be based on proof beyond a reasonable doubt.

Petitioner's Motion for Summary Judgment at 4, 7, 8, and 9.

II. DISCUSSION

The respondents and the petitioner assert that petitioner has exhausted his state court remedies as to the substance of the issues raised in this petition, and that any further return to the state courts on these issues would be futile. The standard by which this Court reviews the state court decisions in this case are set forth by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Section 104(3), as found in 28 U.S.C. § 2254(d). Section 2254(d) provides, as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996). The Supreme Court recently interpreted this statute in *Williams v. Taylor,* 120 S.Ct. 1495 (2000). Writing for the majority of the Court in Part II of her concurrence, Justice O'Connor commented on the meaning of § 2254(d)(1), as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S.Ct. at 1523. In other words, "a federal court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively reasonable." *Williams,* 120 S.Ct. at 1521. With regard to § 2254(d)(2), the Fifth Circuit has explained that "factual findings are presumed to be correct, *see* 28 U.S.C. § 2254(e)(1), and we will give deference to the state court's findings unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Chambers v. Johnson,* 2000 WL 791934, *2 (5th Cir. June 20, 2000) (citing *Williams,* 120 S.Ct. at 1523).

The petitioner's grounds for relief challenge the state courts' findings of fact and interpretation of federal law. Accordingly, this Court will follow the guidance of *Williams* to determine if the courts' decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Court will also analyze whether the decisions were based on "an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A review of the state court decision and the record show that the State's decisions meet these standards, and that there is no basis for habeas relief. The Court will address each ground alleged by the petitioner, in turn.

A. The Supreme Court of the United States has consistently held that the Sixth Amendment commands that a criminal defendant's scope of confrontation includes the right to inquire into a witness' past actions as they may relate to the witness' relationship with the prosecution and the witness' potential for bias or motive.

In support of this ground for relief, Petitioner argues that the trial court violated his Sixth Amendment rights when it limited his cross-examination of the State's key witness, the confidential informant Ellis. He first argues that the Court of Appeals misstated constitutional law when it stated that "the relevancy and admissibility of evidence are within the trial court's discretion and reversal may be had only where that discretion has been abused." *Tenner v. State,* at 7, and that this statement is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." Secondly, he asserts that this constitutional infirmity was perpetuated on appeal when the Mississippi Court of Appeals objectively unreasonably applied constitutional law to the facts. Tenner argues that his trial counsel was not allowed to fully explore Ellis's prior criminal history in an effort to show Ellis "was motivated to testify favorably for the prosecution because of yet uncharged acts." Petition for Writ of Habeas Corpus, p. 4.

The State counters that this argument is unfounded. The State points out that Tenner specifically attempted to question Ellis about how many times he had sold cocaine in Jefferson County. The district attorney immediately objected, based upon relevance, and the trial court

sustained the objection.[2] The petitioner's counsel resumed his cross-examination and subsequently questioned Ellis about the number of buys he had made after he was caught, to which the State objected, based again upon relevance. After a side bar conference, the trial court allowed the petitioner's counsel to question Ellis fully regarding the number of buys Ellis made for Agent Cotton after he got caught and the timing of those buys in relation to his own charges in order to establish his relationship with law enforcement officers and any potential motive for testifying.

This Court is mindful that "'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Johnson v. Puckett,* 176 F.3d 809, 820 (5th Cir. 1999) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)). *Johnson* further explained that "[i]n order to determine whether a trial court's restriction on cross-examination is reasonable, 'we must assess whether the jury was given adequate information to appraise the bias and motives of the witness.'" *Id.* (quoting *United States v. Mizell,* 88 F.3d 288, 293 (5th Cir. 1996)). In reviewing a habeas challenge to a state conviction based upon an alleged violation of the Confrontation Clause, the *Johnson* panel pointed out that a "state court's evidentiary rulings present cognizable habeas claims only if they run afoul of

[2] See Attachment A for a transcript of the disputed portion of Tenner's cross-examination.

a specific constitutional right or render the petitioner's trial fundamentally unfair." *Johnson,* 176 F.3d at 820.

Reviewing this ground under the deferential lens required by § 2254(d) and *Williams v. Taylor,* the Court finds that this ground provides no basis for habeas relief. First, the statement of the Court of Appeals regarding the discretion of the trial judge in determining relevancy and admissibility of evidence is not "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." If, in a state appellate court's review of a trial court's decision, the state appellate court determined that a Federal Constitutional right had been violated by the trial court, the trial court's decision on that issue would be an abuse of discretion. Petitioner is merely arguing the semantics of the Court of Appeals's decision. Second, the Court of Appeals did not objectively unreasonably apply constitutional law to the facts. As the cross-examination of Ellis, as set forth in Attachment A shows, the jury was given adequate information to appraise the bias and motives of the witness. Tenner's attorney extensively questioned the confidential informant Ellis regarding prior drug buys and sales, that he had been convicted and was currently serving time in the state penitentiary, and the details of the alleged drug sale. The limitation placed upon the cross-examination by the trial court neither ran afoul of the Tenner's Confrontation Clause right nor rendered his trial fundamentally unfair.

B. The Court of Appeals of Mississippi violated Tenner's right to due process in finding that the jury was fully aware of Ellis' potential for bias or motive to testify in a manner favoring the prosecution.

Petitioner next asserts that the Court of Appeals violated Tenner's right to due process by determining as fact that the jury was "amply aware of any potential bias, motive, or interest Ellis may have harbored." Court of Appeals's Opinion at 7. He argues that the Mississippi Court of Appeals has no authority to determine facts, or the weight to be accorded to them, and, thus, perverted the jury's function in our constitutional system, thereby violating the due process clause. The State counters that this contention is without merit, citing the standard the federal courts must use to evaluate the restrictions placed on cross-examination, as set forth in *Johnson v. Puckett,* discussed *supra.*

Specifically, the alleged offending portion of the Court of Appeals decision reads, as follows:

> A careful review of the record reveals that the jury was more than *amply aware* of any potential bias, motive, or interest Ellis may have harbored. It was presented to the jury that Ellis was a convicted felon presently incarcerated at the Rankin County Correction Facility for the sale of cocaine and that he was a confidential informant for the Mississippi Bureau of Narcotics at the time of the illegal sale between Tenner and himself. This assignment of error is without merit.

Mississippi Court of Appeals' Opinion at 7 (emphasis added). This Court's review of the transcript of the trial

and the Court of Appeals's decision shows that, pursuant to § 2254(d)(2), this decision was not based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Furthermore, in this Court's position on habeas review, it must presume that factual findings are correct. 28 U.S.C. § 2254(e)(1). By commenting on the breadth and depth of the information which was available to the jury to aid it in reaching a decision regarding Ellis's biases and motives, the Court of Appeals did not supplant the jury's function, thereby violating Tenner's due process rights. As this Court has commented, *supra*, the jury was given adequate information to appraise the bias and motive, therefore the trial court's restriction on cross-examination and the Court of Appeals's decision upholding the restriction was objectively reasonable. Once again, the petitioner is attempting to create constitutional error from the semantics of the state court's opinion, and he has not raised a substantive constitutional issue.

C. In affirming the circuit court's judgment of conviction, the Court of Appeals relied on a hearsay statement presented by the State's drug enforcement officer. The Confrontation Clause, generally, does not permit out-of-court statements to be used to convict. An affirmance founded on a basis which could not be used for conviction cannot be sustained.

Petitioner next argues that the Court of Appeals violated Petitioner's Confrontation Clause rights by using hearsay testimony, given by the Mississippi Bureau of Narcotic's agent during the post-trial motion hearing, to support its affirmance of the conviction. In paragraph 12 of his petition, the petitioner quotes the appellate court

decision, stating that the court said, "'Previous information given by Ellis [**to the drug agent**] indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis' supplier.'" Petition at 9, quoting Court of Appeals's Opinion at 2 (emphasis added).

The State counters that no objection to this testimony was lodged by the defense during the hearing on the motion for new trial. The State further argues that the State appellate court did not rely solely on this piece of hearsay information to affirm the conviction. Rather, the State argues that there is other evidence in the record from the trial which supports this statement. The respondents point to the testimony of the local Sheriff, who stated, without objection by the petitioner, that Ellis had approached him about becoming a confidential informant and agreed to help law enforcement. Transcript of Trial at pp. 146-147.[3] The State further argues that there is nothing in the opinion of the Court of Appeals to indicate that its decision to affirm the conviction relied on the fact that Ellis had purchased drugs from Tenner in the past. Instead, the State asserts that the court's decision was based on its review of the record as a whole.

---

[3] The pertinent part of the Sheriff's testimony reads:

> Mr. Ellis came to me and told me that he knew of people that were distributing drugs in Jefferson County and he was willing to help any way he could. He said, "Whatever I can do, Walker, to help you, I realize that I'm in trouble myself, but I'm willing to help. I'll do anything I can." Some names were mentioned. He told me of people that he knew that he had bought from in the past and that he would be willing to help me in any way he could.

Transcript at pp. 146-147.

Once again, this Court is mindful of the deferential standard it must use to review such findings of fact. These findings of fact are, on federal habeas review, presumed to be correct, and habeas relief cannot be accorded unless the state court's judgment of the claim "resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(e)(1), 2254(d)(2). This Court's review of the State appellate court's determination of the facts in the light of the evidence presented at the State court proceedings shows that the State appellate court's determination of facts was reasonable. The disputed sentence reads, "Previous information given by Ellis indicated that Ellis had purchased cocaine from Tenner before and that Tenner was Ellis's supplier." Court of Appeals's Opinion at 2. There is other testimony that demonstrates that the affirmance was not based solely on the agent's testimony at the motion for new trial,[4] and

---

[4] Based on his argument contained in paragraph 12 of his Petition, the Court has found the following testimony on direct examination of Agent Cotton in the Motion for New Trial, as follows:

> Q. Now, in terms of the way that the drugs were purchased on that particular night, November 17th of 1995. Whose idea was it to buy from Michael Tenner?
>
> A. The idea was initiated from Judge Ellis. That's where the idea come from.
>
> Q. Okay. And the basis being?
>
> A. Excuse me?
>
> Q. Well, I mean, what was the basis of it all?
>
> A. To buy drugs from Michael Tenner, who [James Ellis] told me that he was getting his drugs from. And not only Michael Tenner, there were others – well, one other that he talked about.

State Court Record at 281; Motion for New Trial Transcript at 36.

there is no indication in the state court's opinion, contrary to the petitioner's quote of the opinion, *see supra*, that the information for the basis of this sentence came solely from the state drug agent's post-trail testimony. Rather, from the testimony of the sheriff, the jury could conclude that Tenner was one of Ellis's suppliers. *See* Footnote 3. Ellis identified Tenner in open court, indicated that he knew him and knew where he lived, and he testified that he made at least two "buys" from Tenner. State Court Record at 79, 75, and 81. Accordingly, because there was evidence, other than from the State narcotics agent's testimony at the Motion for New Trial, from which the Mississippi Court of Appeals could conclude that Tenner had previously supplied drugs to Ellis, the decision of the Court of Appeals did not subvert the jury's position, thereby violating due process, and did not violate the Confrontation Clause. Accordingly, this ground does not merit habeas relief.

D. As a matter of Mississippi law, Tenner was entitled to a new trial because of the State's only witness' unimpeached admission that the witness had committed perjury during the trial by identifying Tenner as the person who sold the drugs. Considering the crucial nature of the witness' testimony, the failure of the Mississippi courts to correctly apply Mississippi law violates Tenner's Fourteenth Amendment right that all criminal convictions be based on proof beyond a reasonable doubt.

In this ground for relief, the Petitioner admits that he has raised an issue which the State Courts have not specifically addressed. However, both the petitioner and the State agree that he has presented the substance of this ground to the Mississippi courts. Petitioner argues that

the Mississippi Court of Appeals failed to apply correctly the Mississippi standard for new trials because of recanted material testimony. That failure, he contends, means that his right not to be found guilty under any standard other than beyond a reasonable doubt was infringed in violation of the Fourteenth Amendment. Tenner contends that the circuit court erred when it based its decision in the motion for new trial on the determination of Ellis's personal credibility. He asserts that the trial court and the Court of Appeals abused their discretion by not considering all relevant circumstances surrounding the testimony, including all relevant facts extrinsic to the suspect testimony. He states that this issue, in its constitutional form, was not presented to the state courts. The respondents assert that the state trial court and appellate court properly applied the law regarding recanted testimony based on the facts as found by the state trial court and appellate court.

With this ground for relief, the Court is faced with a clearly unexhausted claim. However, this Court may review such claim. According to 28 U.S.C. § 2254(b)(2), "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." In other words, this Court may not grant habeas relief for a mere error of state law. As the Supreme Court in *Estell v. McGuire* stated, "[w]e have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" *Estell v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). The *Estell* court stated, "[t]oday, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a

conviction violated the Constitution, laws, or treaties of the United States." *Id.* The Supreme Court has further reiterated, "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967) (citations omitted).

The Court has reviewed this ground for relief under the deferential lens of § 2254(d)(2) to determine whether the "adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Again, those facts are given a presumption of correctness. The state trial judge witnessed Ellis's testimony, and found that it did not warrant a new trial. The state appellate court thoroughly reviewed the testimony, discussed the relevant law, and reached the same decision. This Court has reviewed the state court record and finds that these state courts did not reach a decision that was based on an unreasonable determination of the facts in light of the evidence presented. Furthermore, throughout these procedures, the appellant has been afforded due process consistent with the dictates of the Constitution. Accordingly, this ground provides no basis for habeas relief.

CONCLUSION

Accordingly, for the reasons discussed above, the Court finds that Tenner's claims do not present grounds for habeas relief. Therefore, the petition is denied, the

motion for summary judgment is denied, and this petition is hereby dismissed with prejudice. A separate judgment will be entered pursuant to Fed. R. Civ. P. 58.

SO ORDERED, this the 26th day of March, 2002.

/s/ David Bramlette
United States District Judge

ATTACHMENT A

The disputed portion of Tenner's cross-examination reads, as follows:

> Q. Mr. Ellis, you're presently confined in the state pen in Rankin County, Mississippi; is that correct?
>
> A. Right.
>
> Q. And is your prison number 50461?
>
> A. Right.
>
> Q. And I believe you told the jury earlier that you're there for sale of cocaine?
>
> A. Right.
>
> Q. All right. How many times did you sale [sic] cocaine here in Jefferson County?
>
> MR. MARTIN [DISTRICT ATTORNEY]: We would object to relevancy, Your Honor. He's a convicted felon. It's already out in the open.
>
> COURT: I sustain the objection.
>
> Q. (Br Mr. McGehee) How long have you been working for Agent Cotton?

A. Not too long.

Q. Okay. Did you work for him before you got caught?

A. No.

Q. All right. How often have you worked for him after you got caught?

A. Not very long.

Q. Okay. Well, how many people do you claim to have bought drugs from after you got caught?

MR. MARTIN: We would object to relevancy.

THE COURT: Counsel would you approach and explain the relevancy of where you're going?

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH OUTSIDE THE HEARING OF THE JURY:)

MR. McGEHEE: I would like to find out what this relationship is. Also, I think it's very relevant how many time[s] he sold cocaine in Jefferson County versus how many times he was indicted and the charges he pled guilty to.

THE COURT: I've already sustained that objection. Your last question was what now?

MR. McGEHEE: My last question was how often that he has made buys for Agent Cotton since he got caught. And I would like to develop that to see what that relationship is and if this is the only person he claims to have bought drugs from.

THE COURT: I'll let you ask him that question.

(THE FOLLOWING PROCEEDINGS CONTINUED IN OPEN COURT WITHIN THE HEARING OF THE JURY:)

Q. (By Mr. McGehee) Mr. Ellis, how many times after you got caught did you make buys for Agent Cotton?

A. Not but about twice.

Q. All right. And did you ever try to make a buy from anyone other than Michael Tenner?

A. That was all.

Q. That was it. Okay. Now, you said earlier that you knew Agent Cotton.

A. Yeah.

Q. How do you know him? Would you explain that relationship, please.

A. Well, I just run upon him on the street, and he just, you know, was asking me some questions, sold drugs and stuff like that, and that's how I come to know him.

Q. Okay. And when in time did you get to meet him? Was that before you got caught selling drugs or after?

A. Well, I met him before. I don't know that. I probably – I don't know that I met him before then or not.

Q. Okay. Did you sell drugs to Agent Cotton?

A. I didn't sell none to him.

Q. To another narcotics agent?

A. Kenny.

Q. All right. And – I'm Sorry?

A. Kenny. Mr. Kenny [another State narcotics agent]

Q. Okay. To Mr. Kinney Cotton or Mr. Kenny Anderson?

A. Kenny Anderson.

Q. Okay. You sold drugs to Kenny Anderson?

A. Right

Q. Okay. And then after that you met Kenny Cotton?

A. Right.

Q. Okay. And that's when they asked if you would try and help them; is that correct?

A. That's right.

Q. So you know Agent Cotton from that relationship?

A. Right.

Q. Okay. He's not a friend of yours, is he?

A. No.

Transcript of Trial, pp. 79-82. From that point, Tenner's attorney cross-examined Ellis regarding specific details of the alleged drug transaction for which Tenner was charged, the procedures he and the State's agent followed after the "buy," and the alleged phone call Ellis made to Tenner's attorneys before trial.
